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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 323

HUGH SMITH, *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	5
Reasons for Granting the Writ	9
Conclusion	18
Appendix A	19

TABLE OF CASES

De Veau v. Braisted, 363 U.S. 144 (1960)	6, 10, 11, 12
Garner v. Teamsters, Local 776, 346 U.S. 485 (1953)	11
Hill v. Florida, 326 U.S. 804 (1945)	2, 6, 9, 10, 11, 13
Hill v. Florida, 155 Fla. 245, 19 So.2d 857	5
Lanzetta v. New Jersey, 306 U.S. 451 (1939)	15
Raley v. Ohio, 360 U.S. 423 (1959)	15
Scull v. Virginia, 359 U.S. 344 (1959)	15
Staub v. City of Baxley, 355 U.S. 313 (1958)	16, 17
Thomas v. Collins, 323 U.S. 516 (1945)	14, 16, 17
Thornhill v. Alabama, 310 U.S. 88 (1940)	16
United States v. Cohen Grocery Co., 255 U.S. 81 (1921)	15
United States v. Reese, 92 U.S. 214 (1875)	15
Winters v. New York, 333 U.S. 507 (1948)	15

STATUTES

Page

Chapter 447, Florida Statutes, Sections 447.01-447.15:

Section 2 ..... 4, 9

Section 4 3

National Labor Relations Act, 61 Stat. 156, 29 U.S.C. 151 et seq:

Section 7 4

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 et seq:

Section 2(2) 13

Section 504 ..... 4, 12

Section 603 ..... 4, 12

Section 604 12

MISCELLANEOUS

S. Rep. No. 1150, 77th Cong., 2d Sess, Part 1, 4-5 14

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Florida entered May 25, 1962.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 123 So.2d 700, and is attached hereto as Appendix "A."

JURISDICTION

The Supreme Court of Florida denied the petitioner's petition for a writ of certiorari on May 7, 1962 and issued a decision to that effect, in lieu of mandate, on May 25, making its judgment final.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

The same Florida law making it a crime to act as a "business agent" for a labor organization without obtaining a license from the state which this Court in *Hill* v *Florida*, 326 U. S. 804 (1945), declared unconstitutional as in conflict with the National Labor Relations Act was subsequently construed by the Florida Supreme Court to be applicable only "to functions performed by business agents of labor unions which have no relation to collective bargaining". It was then applied to convict the petitioner Smith of so acting without such license.

The questions presented by this petition are:

1. Does such law, so construed and as applied in this case, continue to conflict with the National Labor Relations Act as depriving employees covered thereby of their right freely to select their bargaining representatives, or do the provisions of the Labor-Management Reporting and Disclosure Act of 1959, which disqualify persons convicted of certain felonies from serving as union representatives, make way for the states to impose further disqualification?

2. Is such law, as so construed and as applied in this case, so vague and indefinite as to its coverage and application as to deny petitioner rights of due process where the law does not define nor did the prosecution attempt to allege or show which of the functions of a union representative has no relation to collective bargaining?

3. Does such law, so construed and as applied in this case, operate to deprive petitioner, whose "business agent" functions customarily include soliciting membership in his

union, of rights of free speech and assembly protected by the First Amendment?

STATUTES INVOLVED

Chapter 447, Florida Statutes, Sections 447.01-447.15:

Sec. 4. No person shall be granted a license or a permit to act as a business agent in the State of Florida:

(a) Who has not been a citizen of and has not resided in the United States of America for a period of more than ten years next prior to making application for such license or permit;

(b) Who has been convicted of a felony;

(c) Who is not a person of good moral character; and,

(2) Every person desiring to act as a business agent in the State of Florida shall, before doing so, obtain a license or permit by filing an application under oath therefor with the secretary of state accompanied by a fee of one dollar. There shall accompany the application a statement signed by the president and secretary of the labor organization for which he proposes to act as agent, showing his authority so to do. The secretary of state shall hold such application on file for a period of thirty days, during which time any person may file objections to the issuing of such license or permit.

(3) After the expiration of the thirty-day period, regardless of whether or not any objections have been filed, the secretary of state shall submit the application, together with all information that he may have, including any objections that may have been filed to such application, to a board to be composed of the governor as chairman, the secretary of state, and the superintendent of education. If a majority of the board shall find that the applicant is qualified, pursuant to the terms of this chapter, then the board shall by resolution authorize the secretary of state to issue such license or permit, same shall be for the calendar year for which issued, unless sooner surrendered, suspended or revoked.

The term "business agent" as used in Section 4 is defined in Section 2 of Chapter 447 (Section 2 (2)) as follows:

(2) The term "business agent" as used herein shall mean any person, without regard to title, who shall for a pecuniary or financial consideration, act or attempt to act for any "labor organization" in (a) the issuance of membership, or authorization cards, work permits, or any other evidence of rights granted or claimed in, or by, a labor organization, or (b) in soliciting or receiving from any employer any right or privilege for employees.

The National Labor Relations Act, 61 Stat. 156, 29 U. S. C. 151 et seq:

Sec. 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. 401, et seq:

Sec. 504. (a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of title II or III of this Act, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or . . .

Sec. 603. (a) Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the respon-

sibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

STATEMENT OF THE CASE

On February 8 and March 25, 1960, petitioner Smith, an individual residing in Miami, Florida, and then serving as the duly elected business agent of Painters Local 365, affiliated with Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, was informed against in the Criminal Court of Records, Dade County, Florida, for acting as business agent of that local without a license to do so as required by Section 447 of the Florida Statutes. (R. 3-4, 7-8) Previously his license to act as such business agent had been revoked by the Florida Licensing Board, presumably on the ground that he was not a person of "good moral character."[1] The informations contained no allegations as to which of petitioner's daily activities were deemed to be in violation of the Florida law. Motions to quash those informations were granted on the ground that the statute was unconstitutional as in conflict with the National Labor Relations Act. (R. 5, 9, 13-14). The case was duly appealed by the State to the Supreme Court of Florida. (R. 14-17) That court, in October of 1960, rendered a decision in which it reversed the quashing of the information and ordered the case remanded for trial. In its decision the Florida Supreme Court noted that following the remand by this Court of *Hill* v. *Florida*, 155 Fla. 245, 19

[1] The Licensing Law prohibits licenses to any person who has not been a United States citizen for more than ten years, who has been convicted of any felony or who is not a person of good moral character. Petitioner has been a citizen from birth and has never been convicted of any felony.

So 2d 857, after the reversal of that case in *Hill* v. *Florida*, 326 U. S. 804 (1945), that court had entered an order dissolving the previous injunction entered against the appellant Hill acting as a business agent "only to the extent that the same embraced possible activities of said appellant in collective bargaining" as contemplated by the National Labor Relations Act, in accordance with this Court's decision in the case, but in all other respects upheld its previous judgment. The Supreme Court of Florida went on to state that the Florida licensing law had thus been "so interpreted as not to apply to bargaining representatives of labor unions but applies only to functions performed by business agents of labor unions which have no relation to collective bargaining." On this construction of the statute, the Florida Supreme Court found no conflict with the federal law. In this connection, however, the Florida Supreme Court went on to hold that the passage of the Landrum-Griffin Act in 1959 indicated "a clear intention on the part of Congress not to preempt the field of labor relations in the area with which we are involved in this case, that is to say, the licensing and qualification of officers or paid representatives of labor unions. In other words the rationale of *Hill* v. *Florida*, no longer has application to Section 447.04, Florida Statutes." In support of the foregoing the court cited *DeVeau v. Braisted*, 363 U. S. 144 (1960). (R. 20-24; App. A).

The Florida Supreme Court rejected the other constitutional arguments advanced by petitioner, namely the contention that the Florida licensing law constituted a previous restraint upon freedom of speech and assemblage protected by the First Amendment, and the contention that such law as construed by the Court was so vague and indefinite as to deny petitioner rights of due process. (R. 20-24) This latter point was particularly stressed in a petition for reconsideration filed by petitioner with that

court on November 3, 1960 and denied without opinion on November 15, 1960. (R. 25-27).

Thereafter petitioner was tried before the Criminal Court of Record in and for Dade County, Florida. (R. 78) At the conclusion of the trial, petitioner was convicted of violating the Florida licensing law and was fined the sum of $200 and put on probation for a period of two years subject to imprisonment if within that period he functioned as a business agent. (R. 69-70, 72-73, 189).

At the time of his trial and before, by appropriate motions, petitioner attempted to be informed as to which of his activities as business agent of Painters Local 365 he was engaged in without a license and contrary to Chapter 447, but was not so informed. (R. 9, 80, 87-88, 118).

The undisputed evidence introduced at petitioner's trial shows that a business agent's customary functions, including Petitioner Smith's, consisted of the following:

A prime function of Smith and any business agent of the local is to obtain new members for the union and to obtain the authorization of employees to permit the union to represent them in collective bargaining. This is accomplished by the solicitation of membership or authorization cards in one of the following three ways: (1) by personal, oral solicitation and inducement of employees at their jobs, homes or social gatherings, (2) by the distribution of union pamphlets and literature, and (3) by the calling and addressing of meetings at which union representatives speak. (R. 92-93, 95, 108-109, 138-148).

Another major function is the negotiation and administration of collective bargaining agreements. This involves the actual negotiation of contracts on a yearly or bienniel basis. In the case of Smith and Local Union 365, this is done primarily with an association of painting contractors known as the Miami Chapter of the Painting and Decorat-

ing Contractors of America. After negotiations have been completed and the contract has been signed, it is the particular job of the business agent to administer and police the agreement, that is, to see to it that it is lived up to according to its terms for the protection of the membership. This involves visiting various job sites where work is in progress throughout the day. (R. 119-129, 138-148, 155-156).

A third major function of Smith and other business agents is the adjusting of grievances that arise on the job or under the collective agreement. This again involves going from job to job and attempting to settle the grievance on the spot. If it cannot be settled there, then it is the further function of the business agent to process a grievance up to and through arbitration as per the grievance and arbitration provisions of the agreement. (R. 143-146).

Another function is the procuring of qualified, skilled workmen to perform different types of painting work and seeking to maintain employment at as full a level as possible. On those rare occasions when it becomes necessary to take economic action, the business agent is usually a leader in the conduct of strikes and related picketing activities. (R. 92-93, 96, 100, 104-105, 114-116, 138-148).

With the exception of the striking and picketing activities, the above-described functions are engaged in daily by Smith and other union representatives, and sometimes even on weekends and holidays, and constitute the bulk, if not all, of his functions as business agent. (R. 138-148).

The union and its members and the contractors with whom they deal are subject to the N.L.R.A. (R. 119-129, 133-136).

There was no effort by the State to present evidence showing which of petitioner's activities the State considered unrelated to collective bargaining, and the trial court at the conclusion of the evidence did not determine which functions of petitioner were performed pursuant to

"collective bargaining" and which were not.[2] Instead the court simply found as follows:

> "The issue of, under the decision of the Florida Supreme Court, whether his actions were all pursuant to collective bargaining, *I'll find that some of them were but some of them weren't;* . . ." (Emphasis ours) (R. 184).

Following his conviction and sentence petitioner appealed first to the Circuit Court in and for the Eleventh Judicial Circuit in and for Dade County, Florida, (R. 70-71, 74-75), and then to the Supreme Court of Florida by Petition for Writ of Certiorari, raising the three constitutional questions presented in this case. (R. 70-71, 74-75, 28-36). The Supreme Court of Florida denied the petition without opinion on May 7, 1962 and issued a decision to that effect, in lieu of mandate, on May 25, making its judgment final. (R. 203, 203a, 204).

REASONS FOR GRANTING OF WRIT

I.

This case involves substantial federal questions of conflict between state and federal law and the impairment by state law of rights of free speech and assembly protected by the First Amendment and rights of due process protected by the Fourteenth Amendment. Here the Florida Supreme Court has undertaken to reject the rationale of this Court's decision in *Hill* v. *Florida*, 326 U. S. 804 (1945), as applied to the very Florida statute involved in that case, and in so doing to declare that it was the intent of Congress in enacting the 1959 Landrum-Griffin Amendments to the

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[2] Subsection 2 of Chapter 447 defines the term business agent as follows: "The term 'business agent' as used herein shall mean any person, without regard to title, who shall for a pecuniary or financial consideration, act or attempt to act for any "labor organization" in (a) the issuance of membership, or authorization cards, work permits, or any other evidence of rights granted or claimed in, or by, a labor organization, or (b) in soliciting or receiving from any employer any right or privilege for employees."

National Labor Relations Act to enlarge the allowable area of state interference with the right of employees covered by that Act freely to select their own bargaining representatives. This holding of the Florida Court is contrary to this Court's views, as expressed in *DeVeau* v. *Braisted*, 363 U. S. 144 (1960), of the effect of the 1959 Amendments in this area as well as of this Court's views of the continuing import of the doctrine of *Hill* v. *Florida, supra*. In addition the Florida Supreme Court has so construed the state law requiring the licensing of business agents under criminal sanctions in a manner making it impossible for any individual affected by such law to know under what circumstances and in respect to which of his activities or functions he must obtain a license without threat of jail sentence. Directly contrary to numerous decisions of this Court which hold that the due process clause of the Fourteenth Amendment requires that criminal statutes must be sufficiently definite and certain reasonably to inform the public as to which actions are proscribed, the Florida Court has so construed the licensing statute as to leave all affected thereby in complete darkness as to its coverage. Finally, the state court has upheld the requirement that a license be granted by the state as a prerequisite to the solicitation of membership in a labor organization and the exercise by union representatives of other rights of speech and assembly, again contrary to directly applicable decisions of this Court. Thus, unless this Court intervenes, the federally granted right of union members freely to select their bargaining representatives will be nullified, the right of labor union representatives to exercise rights of speech and assemblage without license from the state will be impaired, and the right of all persons subject to the sanctions of the Florida licensing statute to be clearly informed of its application to them will be denied. Where, as in this case, a state court has attempted to interpret federal statutes, a prior decision of this Court, and the federal Constitution in a

manner contrary to applicable determinations of this Court, substantial reasons for the granting of a writ of certiorari would seem to exist.

II.

It should be remembered that the Florida law licensing union representatives is more than a mere registration statute; rather it undertakes to grant or withdraw the right so to serve based on consideration of citizenship, conviction of any felony, and a licensing board's estimate of "good moral character." In *Hill* v. *Florida, supra*—a case involving the very licensing law now again before this Court—this Court held that unions have the right to select their representatives and these representatives have the right to function in collective bargaining free from conditions fixed by Florida, Congress having given these rights without qualification. The court below, however, has read provisions of the subsequently enacted Landrum-Griffin Act, particularly those provisions thereof which disqualify union representatives who have been convicted of certain felonies, as indicating a congressional intent not to preempt the field of labor relations in this area of qualification. Where Congress, as it did in Landrum-Griffin, has specifically prescribed under what conditions individuals may not serve as union bargaining representatives and has failed to make room for further restriction by the states, the usual rule is that all other restrictions are excluded. *Garner* v. *Teamsters, Local 776*, 346 U. S. 485 (1953). Indeed this issue was considered by this Court in *DeVeau* v. *Braisted*, 363 U. S. 144 (1960) and was decided contrary to the decision of the Supreme Court of Florida. *DeVeau* involved a New York statute prohibiting any person convicted of a felony from serving as a union representative in the longshore industry on the New York waterfront. In upholding the law this Court distinguished the *Hill* case as follows:

> "The sum of these considerations is that it would offend reason to attribute to Congress a purpose to

preempt the state regulation contained in Section 8. The decision in *Hill* v. *Florida*, 325 U. S. 538, in no wise obstructs this conclusion. An element most persuasive here, congressional approval of the heart of the state legislative program explicitly brought to its attention, was not present in that case. Nor was it true of *Hill* v. *Florida*, as it is here, that the challenged state legislation was part of a program, full canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combating local crime infesting a particular industry."

In the course of its opinion in *DeVeau* this Court made clear that Congress did not intend to give the states unlimited power to impose qualifications on union representatives when it enacted Section 504(a) of the Labor Management Reporting and Disclosure Act, 72 Stat 519, even though it did not enact a specific preemptive provision for Section 504 and even though under Section 604 it did provide that "nothing in this Act shall be construed to impair or diminish the authority of any state to enact and enforce general criminal laws with respect to [the same group of serious felonies, with the exception of exclusively federal violations, which are listed in Section 504(a)]". It is clear that Section 604 in no way involves nor refers to the subject of state-imposed qualifications or conditions on the ability of persons to serve as union representatives; it refers only to the enforcement of general state criminal laws establishing certain felonies. While it is true that Section 603(a) of the 1959 Law provides that "nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop stewart, or other representative of a labor organization, or of any trust in which such a labor organization is interested . . . under the laws of any State . . . ", it must be remembered that Section 603(a) appears to have reference to the responsibilities of union representatives as fiduciaries as set forth under Section 501 of the new Federal Law (See dissent of Chief Justice Warren in the *DeVeau* case) and does not have reference to Section 504

or to the new law in general. Section 603(a) speaks of "responsibilities" and "trusts", and the right to pursue remedies for breaches thereof in the state as well as federal courts. It does not speak of the capabilities of persons to serve as union representatives.

Furthermore, it is greatly significant that Section 2 (2) of the 1959 federal labor law specifically states that it continues to be the responsibility of federal authorities and not state authorities to protect the right of employees to choose their own representatives to bargain collectively. Section 2 (2) reads:

> "The Congress finds that, in the public interest, it *continues to be the responsibility of the Federal Government* to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection . . ." (Emphasis supplied)

III.

The principal ground on which the Florida Supreme Court found that the pronouncements of this Court in *Hill* v. *Florida* are no longer applicable was that the Florida statute is now construed to apply "only to functions performed by a business agent which have no relationship to collective bargaining." But as indicated by the Record in this case (R. 138-148, 174-181), all of the ordinary functions of the business agent have a relationship to collective bargaining, and there is no indication in the statute or in the proof of its case by the State which of Petitioner Smith's functions have no such relationship and thus require the holding of a license. If anything, the Florida law, in its definition of business agent, on its face includes functions which have a necessary and direct relationship to collective bargaining, namely the issuance and solicitation of membership or authorization cards or soliciting or receiving from any employer any right or privilege for employees. Further, Section 7 of the federal act guar-

antees the right of free selection of representatives not only for collective bargaining purposes but also for the purposes of organization and assistance in engaging in the various concerted activities, economic or otherwise, for the purpose of achieving mutual aid or protection. *Thomas* v. *Collins*, 323 U. S. 516, 523 (1945).

The Senate gave the following explanation of the scope of the term "collective bargaining" in its Report on Violations of Free Speech and Rights of Labor (S. Rep. No. 1150, 77th Cong., 2d Sess., Part I, 4-5): "The right of self-organization and collective bargaining is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental liberties of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life."

Without a more precise definition or description of those functions of union representatives which have no relationship to collective bargaining, the Florida law as presently construed by the supreme court of that state cannot avoid running afoul of the federal law and interfering with the free selection of collective bargaining representatives. To permit the Florida law as now construed to stand is to provide an easy method of avoiding the proscriptions against state trespass on federal rights.

IV.

The device of construing the Florida License Law to apply only to those functions of union representatives which have no relationship to collective bargaining as a means of avoiding constitutional difficulties must fail for yet another reason. Neither the Law itself nor the construction placed upon it by the Florida Supreme Court give any indication whatsoever which of a union representa-

tive's daily functions have no relationship to collective bargaining. On the contrary, as we have seen, the very definition of business agent contained in the Law indicates that the activities therein specified have a direct and necessary relationship to collective bargaining. The result is that no person who is possibly subject to the law's licensing requirements can know with any certainty when and under what conditions he is so subject. Thus he can exercise clear federal rights only under threat of criminal prosecution.

The Florida law is not simply a regulatory measure but is, in addition, a criminal statute with prescribed penal sanctions for any violation thereof. It has the effect of subjecting persons engaging in customary and usual practices—practices not constituting any crime under the common law—to fine and imprisonment if, after the law's enactment, they continue to engage in such practices. This Court has many times held that, while the state may thus create crimes, it is incumbent upon it to be sufficiently explicit so as to inform what conduct on an individual's part will render him liable to criminal penalties. A statute, and particularly a criminal statute, which is so vague, indefinite and uncertain as to its meaning that the things and matters prohibited and its application to particular persons are not reasonably and readily ascertainable is void under the due process clause of the Fourteenth Amendment. *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *United States* v. *Reese*, 92 U. S. 214 (1875); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *Raley* v. *Ohio*, 360 U. S. 423 (1959); *Scull* v. *Virginia ex rel.*, 359 U. S. 344 (1959); *Winters* v. *New York*, 333 U. S. 507 (1948).

Furthermore, not only are rights to due process violated by any statute which is so ambiguous as to fail to inform individuals as to just which particular acts or functions constitute a crime, but also rights of free speech protected under the First Amendment are also violated when any of the proscribed acts or activities occur in the area of

solicitation and persuasion when it is not clearly indicated just what aspects of speech are proscribed. The First Amendment does not permit vagueness in this area any more than does the Fourteenth Amendment in respect to the proscription of criminal activities. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Thomas* v. *Collins*, 228 U. S. 516 (1945).

There is an additional reason for specificity. Smith's functions as a business agent involved the exercise of rights protected under the National Labor Relations Act as well as rights of speech protected under the First Amendment. Accordingly, it is doubly necessary that any state legislation touching upon these areas be sufficiently explicit to indicate that it does not trespass on those rights as well as to inform union representatives in the state precisely which of their multiple activities are proscribed under Chapter 447. The Florida Licensing Law, both as construed and applied in this case, requires persons at whom it is directed to speculate, not only concerning the coverage of a criminal statute, but also as to whether they can freely engage in rights and activities protected by the federal law and the federal Constitution. The Florida Supreme Court in upholding the law as against such argument has completely disregarded applicable decisions of this Court which do not tolerate ambiguity in these respects. It is respectfully submitted that this ground alone is sufficient to warrant the granting of this Writ.

V.

A final reason for invoking this Court's jurisdiction lies in the refusal of the court below to follow this Court's holdings in *Staub* v. *City of Baxley*, 355 U. S. 313 (1958), and its earlier holding in *Thomas* v. *Collins*, 323 U. S. 516 (1945). Those cases specifically hold that the right of union representatives to solicit membership into their union and to hold meetings to this end is one protected by the First

Amendment and not subject to licensing by the state. In the present case it must be remembered that Petitioner Smith was not convicted and sentenced because of anything he said or did, but simply because he did not have a license to act as a union representative. The very definition of business agent as set forth in the Florida law involves exercises of the right of speech, i.e., solicitation of membership in a labor organization. The record discloses that Smith's daily activities require the frequent exercise of rights protected under the doctrine of *Baxley* and *Thomas*. The Florida licensing law does not attempt to regulate the time, place and manner of solicitation or the use of public streets or other public facilities. It is not limited to the solicitation of funds or sums of money. It licenses mere solicitation to join a labor organization when membership or authorization cards are issued in connection therewith. Nor is it a mere registration statute under which licenses are issued as a matter of course, but rather, like the city ordinance involved in the *Baxley* case, involves formal licensing procedures under which the character of the applicant is one of the considerations passed upon by the Licensing Board. As stated by this Court in *Baxley*.

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.
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>
> "It is undeniable that the ordinance authorized the Mayor and Council of the City of Baxley to grant 'or refuse to grant' the required permit in their uncontrolled discretion. It thus makes enjoyment of speech contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgment by the First Amendment and is protected by the Fourteenth from inva-

sion by state action. For these reasons, the ordinance, on its face, imposes an unconstitutional prior restraint upon the enjoyment of First Amendment freedoms and lays 'a forbidden burden upon the exercise of liberty protected by the Constitution.' *Cantwell* v. *Connecticut*, supra (310 US at 307). Therefore, the judgment of conviction must fall."

CONCLUSION

The Supreme Court of Florida has disregarded applicable decisions of this Court in the field of preemption and respecting the protections against state interference with given rights of unions and their representatives under federal law and the federal Constitution. Further, the constitutional right of any person to be adequately informed of the nature of the crime of which he is accused has been denied. Thus grounds for the granting of this Writ exist in at least three separate respects. It is respectfully requested that this Petition be granted for the reasons stated above.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1960

THE STATE OF FLORIDA,
Appellant,

vs.

HUGH J. SMITH,
Appellee.

Case No. 30,538

Opinion filed October 19, 1960.

An Appeal from the Criminal Court of Record for Dade County, George E. Schulz, Judge.

Richard W. Ervin, Attorney General, B. Clarke Nichols, Assistant Attorney General and Richard E. Gerstein, State Attorney, for Appellant.

Cowart & Douglas and Herbert S. Thatcher (Washington, D. C.), for Appellee.

PER CURIAM.

On February 8, 1960, appellee was informed against in the Criminal Court of Record, Dade County, for acting as a business agent of a labor union between January 19, 1960, and February 5, 1960, without a license to do so, as required by Chapter 447, Florida Statutes. A motion to quash said information was granted March 17, 1960.

On March 25, 1960, appellee was again informed against in the Criminal Court of Record, Dade County, for the same offense committed at the same time as the first offense de-

tailed in the preceding paragraph. On May 12, 1960, motion to quash the latter information was granted on the ground that §447.04, Florida Statutes, was unconstitutional in that it is repugnant to the National Labor Relations Act. We are confronted with an appeal from the latter order.

The first question with which we are confronted is whether §447.04, Florida Statutes, infringes upon the National Labor Relations Act, and is, therefore, unconstitutional under the supremacy clause of the Federal Constitution.

In Hill v. State, 155 Fla. 245, 19 So. 2d 857, the constitutional validity of §447.04, Florida Statutes, was examined and we upheld its validity after deleting therefrom a provision which was held to vest arbitrary power in the board created thereby. The statute considered in Hill v. State, supra, is identical to the statute involved in the instant case, except that a few minor changes, such as changing "United States of America" to "United States" and "State of Florida" to "State," have been made and the section deleted by this Court in Hill v. State, supra, no longer appears in the act.

On appeal to the Supreme Court of the United States, the decision of this Court was reversed on the ground that the Florida Statute conflicted with the National Labor Relations Act, 325 U. S. 538, 89 L. Ed. 1782, 1784 (1945), 326 U. S. 804, 90 L. Ed. 489 (1945). In holding §447.04, Florida Statutes, unconstitutional, the Supreme Court said:

> "It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice. * * * "Section 4 of the Florida act circumscribes the 'full freedom' of choice which Congress said employees

> should possess. It does this by requiring a 'business agent' to prove to the satisfaction of a Florida Board that he measures up to standards set by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that §4 limits a union's choice of such an 'agent' or bargaining representative, it substitutes Florida's judgment for the workers' judgment. * * *
>
> "Our holding is that the National Labor Relations Act and §§4 and 6 of the Florida Act as here applied cannot 'move freely within the orbit of their respective purposes without infringing upon one another.' * * *"

Examination of this decision discloses that the Supreme Court reversed this Court only to the extent that the Florida Statute would be applied as to restrict the freedom of workers in the selection of their collective bargaining representatives. To that extent only the United States Supreme Court held that the act in question conflicted with the National Labor Relations Act. It follows that if the Florida Act be so interpreted as to remove the conflict so condemned by the National Labor Relations Act, the Florida Statute (§447.04, F.S.) would be constitutional as modified by the United States Supreme Court in Hill v. State, supra.

Following the remand of Hill v. State by the Supreme Court of the United States to this Court, we entered an order of reversal on November 29, 1945, wherein we said:

> "* * * (b) that in so far as said judgment sustained the injunction entered in the trial court as applied to the appellant Leo H. Hill with respect to any activity he might engage in as the collective bargaining representative of the appellant labor union as authorized under and contemplated by the National Labor Relations Act, such judgment of this Court is reversed, and said injunction issued against such appellant by the trial court should be dissolved only to the extent that the same embraced possible activities of said appellant in collective bargaining for the appellant union's members as provided in and contemplated by

said federal act; and (c) that in all other respects such judgment of this Court of November 28, 1944, shall stand as the amended and modified judgment of this Court in this cause. * * *"

It follows that §447.04, Florida Statutes, has been so interpreted as not to apply to bargaining representatives of labor unions but applies only to functions performed by business agents of labor unions which have no relation to collective bargaining. It is, therefore, our view that §447.04, Florida Statutes, as interpreted by this Court is not subject to the attack made on it in Hill v. State.

It further appears that since the foregoing decisions interpreting §447.04, Florida Statutes, the National Labor Relations Act has been modified in certain respects by the Labor Management Reporting and Disclosure Act so as to indicate a clear intention on the part of Congress not to preempt the field of labor relations in the area with which we are involved in this case, that is to say, the licensing and qualification of officers or paid representatives of labor unions. In other words, the rationale of Hill v. State no longer has application to §447.04, Florida Statutes. See purpose of the Labor-Management Reporting and Disclosure Act, 73 Statutes 519, 20 U.S.C.A., §§401 and 504; DeVeau v. Braisted, 28 U.S.L.Week 4390 (U. S. June 6, 1960).

The second question presented is whether the provisions of §447.04, Florida Statutes, constitutes an undue restraint upon freedom of speech or freedom of assemblage.

This Court answered that question in the negative in Hill v. State, supra, and the Supreme Court of the United States did not disturb that holding when the case reached them. These decisions would appear to conclude the question. See also Thomas v. Collins, 323 U. S. 516, 89 L. Ed. 430 (1944).

Question three has to do with whether or not granting the motion to quash the information without permission of the state to file an amended information barred it from doing so thereafter.

This question is without merit and is concluded by Hayden v. State, 150 Fla. 789, 9 So. 2d 180 (1942).

The concluding question is whether or not the information charges an offense under the laws of the State of Florida. We hold such allegations are sufficient. Collier v. State, 116 Fla. 703, 156 So. 703 (1934); Overstreet v. Whiddon, 130 Fla. 231, 177 So. 701 (1937); Jarrell v. State, 135 Fla. 736, 185 So. 873 (1939).

It follows that the judgment appealed from must be, and is hereby, reversed.

Reversed.

THOMAS, C. J., TERRELL, HOBSON, ROBERTS, DREW, THORNAL and O'CONNELL, JJ., concur.

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IN THE

Supreme Court of The United States

NO. 323

OCTOBER TERM, 1962

HUGH SMITH,
Petitioner,

-vs-

STATE OF FLORIDA,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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TOPICAL INDEX

	Page
JURISDICTIONAL STATEMENT	1-10
RESPONSE ON THE MERITS	10-21
CONCLUSION	21-22

TABLE OF CITATIONS

CASES

Brooks v. Missouri, 124 U.S. 394 8 S.Ct. 443, el L.ed. 454	8
Buck v. California, 343 U.S. 99, 72 S.Ct. 502, 96 L.ed 775	8
Collier v. State, 116 Fla. 703, 156 So. 703, cert den 55 S.Ct. 237, 293 U.S. 622, 79 L.ed 709	20
Daisey v. State, Fla., 113 So. 2d 700	5
De Saussure v. Gaillard, 127 U.S. 216, 8 S.Ct. 1053, 32 L.ed. 1[illegible]	8
De Veau v. Braisted, 363 U.S. 144, 4 L.ed. 2d 1109, 80 S.Ct. 1146	12, 13, 14, 15
Durley v. Mayo, 351 U.S. 277, 100 L.ed. 1178, 76 S.Ct. 806	9, 10, 22

	Page
Engel v. City of North Miami, Fla., 115 So. 2d 1	6
Gerald v. State, 135 Fla. 736, 185 So. 873	21
Hill v. Florida, 65 S.Ct. 11, 326 U.S. 804, 90 L.ed. 489	10, 11, 12, 16
Hill v. State, 155 Fla. 245, 19 So. 2d 857	10, 11, 15
Leonard v. Vicksburg, Shreveport and Pacific Railroad Company, 198 U.S. 416, 25 S.Ct. 750, 49 L.ed. 1108	8, 9
Lynch v. New York ex rel. Pierson, 293 U.S. 52, 55 S.Ct. 16, 79 L.ed. 191	8
Overstreet v. Whiddon, 130 Fla. 231, 177 So. 701	21
Pierce v. Somerset Railway, 171 U.S. 641, 19 S.Ct. 64, 43 L.ed. 316	8, 9
Pleger v. State, Fla. 68 So. 2d 371	4
Ramagli Realty Company v. Craver, Fla., 121 So. 2d 643 and 123 So. 2d 404	4
Smith v. State, 143 So. 2d 491	1-2, 7
State v. Smith, 123 So. 2d 700	2, 3, 6
Staub v. Baxley, 355 U.S. 313, 2 L.ed. 2d 302, 78 S.Ct. 277	17, 18, 19
Thomas v. Collins, 323 U.S. 516, 89 L.ed. 430	16, 18, 19

Utley v. City of St. Petersburg, Fla., 292 U.S. 106, 54 S.Ct. 593, 78 L.ed. 1155 ..... 8, 9

Washington v. Mayo, Fla., 77 So. 2d 620, 621 9

STATUTES

FEDERAL:

73 Statutes 519 ..... 10, 12

29 U.S.C.A., Section 151 15

29 U.S.C.A., Section 401 ..... 12, 15

29 U.S.C.A., Section 504 12

FLORIDA:

Chapter 447 ..... 3, 20

Section 447.04 ..... 9, 12, 13, 15

Section 26.53 ..... 3, 4

Section 79.10 9

TEXTS AND OTHER AUTHORITIES

Article V, Section 4, Florida Constitution 4, 5

Florida Appellate Rule 2.1 (5) (a) 4

Florida Appellate Rule 6.2 4

United States Supreme Court Rules 10, 11, 22 ..... 2, 3

IN THE

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NO. 323

OCTOBER TERM, 1962

HUGH SMITH,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

By petitioner's own announcement, the judgment of the Florida Supreme Court, which he seeks to have this tribunal review, is the one issued on May 7, 1962, and found in 143 So. 2d 491, in words and figures as follows:

"SMITH

v.

STATE.

No. 31478.

Supreme Court of Florida.

May 1962.

Certiorari denied without opinion."

Considering that certiorari was denied him without opinion by the simple unequivocal notation set out above, respondent wonders how such ominous assessments can be made against said decision? Perhaps petitioner would have this Court consider that the opinion of the Supreme Court of the State of Florida in *State v. Smith*, Fla., 123 So. 2d 700 (copy of the text of which may be found in petitioner's Appendix "A"), is in fact what the court concluded in its judgment bearing date of May 7, 1962, denying petitioner certiorari (*Smith v. State*, supra). It would indeed take considerable legal magic to transpose the announced findings of the Florida Supreme Court in *State v. Smith*, supra, and make them the *sub rosa* findings of said tribunal in a per curiam decision without opinion denying certiorari some eighteen (18) months later.

Respondent notes that at no time after the Florida Supreme Court rendered its decision in *State v. Smith*, supra, did petitioner (then appellee) ever seek judicial review of that decision in this or any other court. Considering the specific pronouncements to be found in the revised rules of the Supreme Court

of the United States, to-wit: Rules 10, 11 and 22, it is apparent that the present petition comes much too late if, by its filing, petitioner seeks review of said opinion in *State v. Smith*, supra.

If in fact that is not what petitioner seeks, then why the repeated references and attachment of said opionion as Appendix "A" to his petition? It well may be that without this opinion (presently more than two years old) petitioner could not even allege any controversy.

In his statement of the case, petitioner concedes that after the Supreme Court of Florida rendered its decision in *State v. Smith*, supra, he was tried in the Criminal Court of Record in and for Dade County, Florida, and convicted of violating the pertinent provisions of *Chapter 447, Florida Statutes*, here under consideration. Petitioner further concedes that following said conviction and sentence ($200.00 fine and two years probation), he appealed said conviction to the Circuit Court in and for the Eleventh Judicial Circuit, Dade County, Florida. This was his choice and his alone. In most circumstances the appeal of a criminal conviction for a misdemeanor is appropriately taken to the circuit court in the judicial circuit involved—for in fact said circuit courts are vested with *final appellate jurisdiction* in all cases of misdemeanors arising in the criminal courts of record, the county courts, the county judge's courts, the courts of the justices of the peace and over all judgments or sentences of any municipal court. See *Section 26.53, Florida*

Statutes. See also *Pleger v. State*, Fla., 68 So. 2d 371. However, when constitutional (state or federal) questions have been or are raised by a given accused at or during the course of his trial of said misdemeanor, and he is convicted thereunder, the appeal from said conviction should be taken within 90 days after said sentence is entered (see *Florida Appellate Rule 6.2*) *to the Florida Supreme Court* (See *Article V, Section 4, Florida Constitution* and *Florida Appellate Rule 2.1.(5) (a)*). Certainly petitioner cannot quarrel with the proposition that said rules were in existence and applicable to him at the time in question. Their pronouncements are not in any sense obtuse or enigmatic. In point of fact, they are simply terse, basic English pronouncements by which all litigants should govern themselves with reference to state appellate procedure.

When the Circuit Court of Dade County, to which petitioner appealed, concluded that his conviction should be affirmed, it exercised its statutory prerogative of final appellate jurisdiction. See *Section 26.53, Florida Statutes*. Respondent does not suggest that there was no tribunal to which petitioner could then go to seek further review other than to say that if he genuinely felt himself aggrieved, the course which a petition for certiorari (to the Dade County Circuit Court) should have taken was one directed to the appropriate district court of appeal. See *Ramagli Realty Company v. Craver*, Fla., 121 So. 2d 648 and 123 So. 2d 404.

Needless to say, petitioner did not feel constrained to go to the appropriate court for his review but elected instead to seek the extremely limited review of the Florida Supreme Court by petitioning for certiorari to said court. *There is simply no existing means whereby certiorari may be taken from a circuit court (sitting as an appellate court, as was the case here) to the Florida Supreme Court. Article V, Section 4 of the Florida Constitution* clearly and carefully delineates the extremely limited circumstances in which the Florida Supreme Court may be petitioned to review by certiorari decisions of the appellate courts. This is limited exclusively to decisions of the three existing district courts of appeal. No other tribunals are within that pale.

It thus appears that petitioner, by his own choice, elected to seek appellate review in the Circuit Court for Dade County. It further appears that when that appellate review terminated adversely to him, he did not seek the old "common law" certiorari in the District Court of Appeal in and for the Third District but chose instead to seek review by certiorari in a court which, by constitutional provision, simply had no jurisdiction pursuant to which it could have granted such review even if it were so inclined.

Nor can it be said that by ultimately filing a petition for writ of certiorari in a court which simply did not have jurisdiction to grant same (the Florida Supreme Court), that said court should have considered that petition for writ of certiorari as an appeal whereupon it could have proceeded to determine what review, if any, was indicated. In the case of *Daisey v. State*, Fla., 113 So. 2d 700, the Supreme Court of Florida con-

cluded that certiorari was not the proper method of obtaining review of a circuit court's decision affirming the petitioner's conviction, in the Dade County Metropolitan Court of certain traffic violations even though constitutional issues were raised.

Certainly more to the point, is the decision of the Supreme Court of Florida in the case of *Engle v. City of North Miami*, Fla., 115 So. 2d 1, wherein said court concluded unequivocally that a petition for certiorari could not and would not be considered as a notice of appeal in order to accomplish or secure appellate review.

This substantially conforms to a longstanding policy adhered to by this very Court and, respondent respectfully submits, is no departure whatever from the well-ordered concepts of due process to say nothing of the absolute right vested by the Florida Constitution in its highest court to determine the latitude of its jurisdiction.

It thus conclusively appears that when petitioner had the free option to assail the correctness of the judgment of the Florida Supreme Court in *State v. Smith*, supra, he did nothing save and except permit time to pass—so much time that he is now precluded from having that judgment reviewed.

When he could have brought his appeal directly to the Florida Supreme Court he elected instead to bring it in the

Dade County Circuit Court. That choice was his and his alone. In that decision no one connected in any way with the State of Florida had a hand.

After the appellate court of his own choosing determined that his conviction was lawfully secured, petitioner, again exercising his free choice, did not seek review by certiorari to the appropriate district court of appeal but elected instead to seek it in a court (the Florida Supreme Court) which was powerless to grant it.

During this entire appellate chain, it is at least abundantly clear that all the choices were made by petitioner and no one else. Despite the several options of judicial review open to him, it appears that he cavalierly rejected them all and embarked instead on an appellate course calculated to strip him of the very appellate review he now insists was his due. Considering that all these choices were made by him, knowing full well that to do so might result in the very situation in which he presently finds himself, this Court is respectfully urged to find that his and only his folly or disregard of the clear guide lines referred to above is responsible therefor. So having found, and respondent is confident that such a conclusion must be reached by this Court, the action of the Florida Supreme Court in denying the petition for writ of certiorari in *Smith v. State*, supra, was simply a judicial acknowledgment of an abject lack of jurisdiction. That being so, and surely it is, it must follow, as the night the day, that the petition for writ of certiorari here sought, should and must be denied for the reason that it is shrouded in such jurisdictional deficiencies as would negative

any intelligent attempt to cloak it with appropriate appellate raiment.

This Court has consistently held that it is essential to show that not only must the state court's decision rest on a federal question, but it must also appear that a decision as to such question was necessary to the state court's determination. *De Saussure v. Gaillard*, 127 U.S. 216, 8 S.Ct. 1053, 32 L.Ed. 125 and *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191. See also annotations in 100 L.Ed. 1200, 1203 and 84 L.Ed. 925, 935, et seq.

Quite apart from the fact that the decision of the Supreme Court of the State of Florida denying petitioner review by certiorari in nowise turned on or was concerned with either a federal question or an issue of federally assured due process, even if it had been so colored, it is axiomatic that this would not *per se* constitute a valid basis upon which petitioner could now complain. In this regard, the Court's attention is invited to its own pronouncements anent this matter. *Pierce v. Somerset Railway*, 171 U.S. 641, 19 S.Ct. 64, 43 L.Ed. 316; *Leonard v. Vicksburg, Shreveport and Pacific Railroad Company*, 198 U.S. 416, 25 S.Ct. 750, 49 L.Ed. 1108; *Utley v. City of St. Petersburg*, Florida, 292 U.S. 106, 54 S.Ct. 593, 78 L.Ed. 1155; *Lynch v. New York ex rel. Pierson*, supra; *Brooks v. Missouri*, 124 U.S. 394, 8 S.Ct. 443, 31 L.Ed. 454; *Buck v. California*, 343 U.S. 99, 72 S.Ct. 502, 96 L.Ed. 775. See also annotations, 100 L.Ed. 1200, 1203-6; 84 L.Ed. 925, 940, et seq.

Moreover, this Court has indicated that it will decline to

review decisions of state courts where it appears that the person complaining of an alleged violation of some right under the Federal Constitution has by his own acts or omission to act waived such right. *Pierce v. Somerset Railway*, supra; *Leonard v. Vicksburg, Shreveport and Pacific Railroad Company*, supra. This is particularly true where a person has either failed to avail himself or ignored the remedies available under the very statute which he claims is objectionable. *Utley v. City of St. Petersburg*, Florida, supra.

The basic pronouncements to be found in the immediately aforementioned decisions of this Court were brought forth and coalesced in the realm of criminal law by this Court's own recent decision in the case of *Durley v. Mayo*, 351 U.S. 277, 100 L.Ed. 1178, 76 S.Ct. 806, in which it concluded that the Florida Supreme Court, in denying the petitioner relief by habeas corpus, rested its decision on adequate state grounds; they being respectively statutory *res adjudicata* (*Section 79.10, Florida Statutes*) and substantive or case law *res adjudicata* (*Washington v. Mayo*, Fla., 77 So. 2d 620, 621).

That either or both of the bases for the application of that doctrine by the Supreme Court of Florida was an adequate state ground in this Court's view needs no further saying.

In the instant proceedings, we are concerned neither with a statutory pronouncement nor with some case law interpreta-

tion of a principle of state law, but rather with the undeniable fact that the Supreme Court of Florida simply did not have jurisdiction to grant review by certiorari to petitioner.

Nor need this Court consider that the Supreme Court of Florida might have rested its order of dismissal on an adequate state ground, as was the case in *Durley v. Mayo*, supra. It may be categorically stated and respondent so does, that the order of the Supreme Court of Florida in question was in fact founded upon state grounds which are conclusively adequate.

RESPONSE ON THE MERITS

Section 447.04, Florida Statutes, as it presently exists, does not infringe upon the *National Labor Relations Act* for the reason that such statute presently applies to the activities of a "business agent" of a labor organization which activities are not related to collective bargaining rights under the *National Labor Relations Act* and due to the fact that the *National Labor Relations Act* as modified by the *Labor-Management Reporting and Disclosure Act of 1959*, 73 *Statutes* 519, recognizes the right of the State to impose restrictions upon union officers such as are contained in *Section 447.04*, supra.

When the constitutionality of *Section 447.04*, supra, was first considered by the Florida Supreme Court in *Hill v. State*, 155 Fla. 245, 19 So. 2d 857, it was held to be constitutional after deleting therefrom a provision granting arbitrary power to the board created thereunder. That decision in *Hill v. State*, supra, was reversed by this Court on the ground that the Florida statute conflicted with the *National Labor Relations Act* and

the case was remanded for further proceedings. *Hill v. Florida*, 65 S.Ct. 11, 326 U.S. 804, 90 L.Ed. 489.

The only announced basis upon which this Court reversed the judgment of the Florida Supreme Court in *Hill v. State*, supra, was that if said statute were applied so as to restrict the freedom of workers in the selection of their collective bargaining representatives it would and to that extent alone, conflict with the *National Labor Relations Act*. Assuming that the condemned portion under *Hill v. Florida*, would be removed so that it no longer collided with the *National Labor Relations Act*, the aforesaid section is and would be constitutional under the decision of the Florida Supreme Court in *Hill v. State*, supra, as modified by the decision of this Court in *Hill v. Florida*, supra.

Bearing this in mind, it is apparent that said position was accepted by the Florida Supreme Court in *Hill v. State*, supra, for on remand of that case from this Court to the Florida Supreme Court, said court entered an order of reversal on November 29, 1945, which order removed the portions of the section found offensive by this Court but in all other respects its judgment stood as amended.

Thus it appears that the aforesaid section has been and is presently interpreted as to have no application to bargaining representatives of unions but rather a simple application to activities or functions of a "business agent" bearing no relation to collective bargaining. So viewed, it is submitted that *Section 447.04*, supra, as ultimately interpreted and applied by the Florida Supreme Court, is not subject to the condemnation visited upon it in *Hill v. Florida*, supra.

By the passage of the *Labor-Management Reporting and Disclosure Act*, 73 *Statutes 519*, the *National Labor Relations Act* has been modified in certain particulars. Said modification evidenced a clear intention on the part of Congress not to preempt the field of public relations here involved eg. the licensing and qualification of officers or paid representatives of unions.

In other words, it is the respondent's position that the *Labor-Management Reporting and Disclosure Act* has so spelled out the intention of Congress in this area that the rationale of *Hill v. Florida*, supra, no longer has any valid application to *Section 447.04*, supra.

The purpose of said modifying legislation was to correct or eliminate certain improper practices which Congress found to exist in certain labor unions. See *29 U.S.C.A., Section 401*. Pursuant to the aforesaid, certain means were utilized to effectuate the purposes outlined in the aforesaid section of the code. *29 U.S.C.A., Section 504*.

The effect of the *Labor-Management Reporting and Disclosure Act* upon the *National Labor Relations Act* and the decision of this Court in *Hill v. Florida*, were considered by this Court in the case of *De Veau v. Braisted*, 363 U.S. 144, 4 L.Ed. 2d 1109, 80 S.Ct. 1146.

The cited case was an appeal from the Court of Appeals of New York upholding the constitutionality of an act making it a crime for any person to solicit, collect or receive dues on behalf of any labor organization if any officer or agent of such

organization has been convicted of a felony unless such officer had been subsequently pardoned therefor by the appropriate authority of the state or jurisdiction when such conviction was had or unless such person received a certificate of good conduct from the Board of Parole to remove the disability.

This Court reviewed investigations conducted of the conditions existing on the waterfront in the states of New York and New Jersey which resulted in the two states entering into a compact designed to create a commission with authority to ameliorate such conditions. Such compact was approved by Congress. The statute in question was not submitted as part of the compact but constituted supplementary legislation adopted to carry out the objectives of such compact.

This Court rejected the argument that the decision in *Hill v. Florida*, supra, was authority for the proposition that there was a conflict between this statute and the *National Labor Relations Act* in contravention of the supremacy clause of the *Constitution of the United States*.

It might be argued that there were two distinguishing features between *Section 447.04, Florida Statutes*, and the New York statute involved in the *De Veau* case, supra, viz: the New York statute merely made it a crime for certain persons to solicit dues on behalf of an organization which had as an officer thereof a person who had been previously convicted of a felony and such legislation was enacted pursuant to a compact which had been approved by Congress.

With regard to the first point mentioned above, it is submitted that it is clear that there is very little distinction between prohibiting certain persons from acting on behalf of a union with violations thereof being made subject to criminal sanctions and requiring that certain labor union representatives obtain a license prior to engaging in certain union activities with violations thereof being made subject to criminal sanctions. In either case, the object of the legislation is to insure that a certain designated class of persons do not obtain control of the activities of labor organizations within a state. In both instances, the legislation would prohibit certain persons whose background and previous activities would make it appear that their participation in positions of responsibility in the labor union movement would be inimical to the best interest of the labor union, its individual members and the general public.

With regard to the second point mentioned above, it is submitted that the proper perspective to be given to the compact which was considered by this Court in the *De Veau* case, supra, is that it was evidence of the fact that provisions such as were involved in that case and in the instant case do not conflict with the *National Labor Relations Act*. To hold otherwise would require a finding that the states of New York and New Jersey, having received special permission from the Congress of the United States, may undertake to regulate certain areas conceivably within the scope of the *National Labor Relations Act* whereas the other 48 states in the Union would not have authority to regulate such activities without first obtaining the special consent of Congress to do so.

Finally, with regard to both of the contentions discussed above, it is submitted that the *De Veau* case, supra, clearly indicates that the adoption of the *Labor-Management Reporting and Disclosure Act* by Congress constituted an expression on the part of Congress that no pre-emption of the states authority to regulate or prohibit certain persons from representing labor unions in order to insure against corruption in such unions was intended.

In view of the above, it is submitted that *Section 447.04, Florida Statutes*, does not conflict with the *National Labor Relations Act, 29 U.S.C.A., Section 151*, et seq., as modified by the *Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A., Section 401*, et seq.; and that, therefore, such statute is not rendered unconstitutional by operation of the supremacy clause to the *Constitution of the United States*.

Petitioner next contends that this Court's jurisdiction should be invoked because a failure to do so would in effect constitute an undue restraint upon his enjoyment of his constitutional rights to the freedoms of speech and assemblage. Such a contention should not properly be lodged in this case, as will be demonstrated post.

That precise question was presented to and considered by the Florida Supreme Court in *Hill v. State*, supra, wherein it held that *Section 447.04*, supra, did not violate any constitutional rights to the freedoms of speech or assemblage. When that

decision was reversed by this Court in *Hill v. Florida*, supra, this Court did not see fit to comment upon or in any way disturb or modify the specific findings of the Florida Supreme Court that the aforesaid section did not offend or collide with these constitutional rights.

In the case of *Thomas v. Collins*, 323 U.S. 516, 89 L.Ed. 430, this Court considered and struck down a statutory provision enacted by the State of Texas which would require that representatives from National Labor Unions register with the State of Texas prior to undertaking speaking engagements in that state. Insofar as the statute would require the registration of labor union officials in the State of Texas, whose only activity in the state would be to speak at meetings, it was held unconstitutional. The court said:

> ". . . If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.
> "Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. In that context, such solicitation would be quite different from the solicitation involved here. It would be free speech plus conduct akin to the activities which were present, and which it was said

the state might regulate, in Schneider v. Irvington, 308 U.S. 147, 84 L ed 155, 60 S Ct 146, and Cantwell v. Connecticut, 310 US 296, 84 L ed 1213, 60 S Ct 900, 128 ALR 1352, both supra. That however must be *done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly. . . .

It is clear that the statute involved in the instant case would have no application to a labor union official coming into this state for the sole purpose of making a speech. Rather, this statute applies only to business agents who undertake to act for a labor organization in the performance of functions such as a collection of funds, securing subscriptions, making work assignments and other activities which might be undertaken on the part of a business agent for a labor organization which would have no relation to their function as collective bargaining agents for such labor organization.

The statute in question, then, clearly seeks to regulate activities within the realm where the state may impose reasonable registration or identification requirements without intruding upon the rights to freedom of speech and freedom of assemblage guaranteed by the *Constitution of the United States.*

Petitioner would seek to gain substantial comfort from the case of *Staub v. Baxley*, 355 U.S. 313, 2 L. Ed. 2d 302, 78 S. Ct. 277. Respondent feels that this as well is ill-sought. The

case of *Staub v. Baxley*, supra, is essentially nothing other than a restatement by this Court of the law established in *Thomas v. Collins*, supra. This Court, in outlining the provisions of the ordinance under consideration in the *Staub* case, supra, said:

> "This ordinance in its broad sweep makes it an offense to 'solicit' citizens of the City of Baxley to become members of any 'organization, union or society' which requires 'fees (or) dues' from its members without first applying for and receiving from the Mayor and Council of the City a 'permit' (Sections I and II) which they may grant or refuse to grant (Section V) after considering 'the character of the applicant, the nature of the . . . organization for which members are desired to be solicited, and its effects upon the general welfare of (the) citizens of the City of Baxley' (Section IV)."

In holding this ordinance unconstitutional, the court discussed the "undeniable facts" that the ordinance did not contain any "semblance of definitive standards or other controlling guides" but, rather, gave the designated city officials authority "to grant 'or refuse to grant' the required permit in their uncontrolled discretion." Under such circumstances, the statute was held to be in violation of the First Amendment to the Constitution. In both the *Thomas* case, supra, and the *Staub* case, supra, the statutes or ordinances attacked were applied so as to prohibit the exercise by individuals of their right to speak in behalf of a labor organization at meetings or in prospective members' private homes with no further activity being undertaken by the speaker.

The Florida statute under attack here could not possibly

be given the application attempted in the *Thomas* and *Staub* cases, supra. Rather the Florida statute clearly comes within the area where reasonable requirements may be imposed without violating the provisions of the First Amendment. The petitioner, furthermore, does not contend that such an interpretation of the Florida statute could or should be made. Rather, he has presented a modified version of the argument that labor organizations have been making for many years which is to the effect that labor unions are no different from religious, fraternal and charitable organizations and should be entitled to enjoy the same privileges and immunities as such organizations receive. To this writer's knowledge, such argument has never been embraced by any court. The economic power and wealth of labor organizations is something which is so widely known that it is submitted that this Court could certainly take judicial knowledge thereof. Those facts, together with the much publicized and recently much investigated ability of a labor organization when it falls into the control of persons not "of good moral character" to do immense harm not only economically but physically as well to citizens of this country and to the citizens of the State of Florida, adequately shows the fallacy inherent in that analogy. Respondent is not aware of any case which lends any credence to this argument so long as the regulation attempted requires that something other or, in addition to speaking on behalf of a cause be required before the regulations are imposed.

Inasmuch as the Florida statute does not attempt to regulate within the areas condemned by this Court in the *Thomas* and *Staub* cases, supra, it is submitted that no area of conflict be-

tween such statute and the First Amendment has been demonstrated by petitioner.

It therefore follows that even when viewed in light of petitioner's suggested infirmities, no deficiencies, much less any clothed with a deprivation of due process, can legitimately be said to spring from the legislation in question or the prosecution brought thereunder.

Petitioner would have the Court believe critical information was not furnished him within the framework of the charge to be found in the information in question. It would seem to follow that because of it he was quite, if indeed not totally, unable to properly defend against such a charge.

Respondent respectfully submits that the information plainly and in very ordinary language charged petitioner with acting as a business agent of a labor union in Dade County, Florida, between January 19, 1960, and March 25, 1960, without having a license or permit to act as such business agent issued to him pursuant to the provisions of *Chapter 447, Florida Statutes.*

Indictments or informations charging the accused with committing a specified offense at divers times between two dates or at some time between two dates, sufficiently allege the date of the offense under the rule requiring the date of the offense to be alleged with definiteness and certainty so long as such dates are within the period of limitation. *Collier v. State*, 116

Fla. 703, 156 So. 703, cert den 55 S.Ct. 237, 293 U.S. 622, 79 L. Ed. 709; *Overstreet v. Whiddon*, 130 Fla. 231, 177 So. 701; *Gerald v. State*, 135 Fla. 736, 185 So. 873.

The information alleges that the petitioner committed the offenses charged in Dade County, Florida, and, therefore, the necessary statement of place of venue is contained in such information.

The labor union which the petitioner was charged with acting as a business agent for was identified with particularity with both the name and the local union number of the union being alleged.

It is submitted that the information filed in the trial court stated the charge against petitioner with such clearness and certainty as to apprise him of the charge he would be called on to meet at the trial and that such information was therefore, quite sufficient.

CONCLUSION

The Supreme Court of the State of Florida, in denying petitioner the writ of certiorari which he sought, simply exercised its free judicial right, nay duty to determine that it did not have jurisdiction to entertain the petition in question. In this regard, it is respectfully submitted that the action of said court neither is nor should be subject to question. It is perhaps the most compelling of adequate state grounds which this writer can envision. As such, it poses a legal barrier to

further judicial review by this Court based upon a host of sound pronouncements culminating in *Durley* v. *Mayo*, supra. Quite apart from the aforesaid, respondent is resolute in his position that the merits of petitioner's claim when viewed in light of the authorities set out above and the obvious factors taken into consideration by the Florida Supreme Court and this Court in arriving at said conclusions, are signally deficient in at least several material particulars—to such an extent that the only course this Court should follow in disposing of the petition presently being considered is one calculated to produce its order of denial.

Respectfully submitted

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Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Response to petition for writ of certiorari to the Supreme Court of the State of Florida to the Honorable Herbert S. Thatcher, 1009 Tower Building, Washington 5, D.C., counsel for the petitioner, by mail, this day of November, 1962.

GEORGE R. GEORGIEFF
Assistant Attorney General
Of Counsel for the Respondent

Office-Supreme Court, U.S.
FILED
DEC 13 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

323

HUGH SMITH, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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STATE OF FLORIDA, RESPONDENT

Reply to Brief for the Respondent in Oppositon

I.

Respondent questions whether the Petitioner is in fact seeking review of *State* v. *Smith*, 123 So. 2d 700 (dated October, 1960), rather than the denial of certiorari by the Supreme Court of Florida in *Smith* v. *State*, 143 So. 2d 491 (dated May, 1962) and, if not, why the Petition refers to the opinion of the Supreme Court of Florida in the former case. The answers are simple. Petitoner did not seek review of *State* v. *Smith* in 1960 because that opinion and

decision did not convict him. He was not convicted until after his subsequent trial before the Criminal Court of Record in and for Dade County. Moreover, it was impossible at that time to ascertain how the opinion of the court would be applied to the facts and circumstances of Petitioner's case. The Petition makes it abundantly clear, as admitted by Respondent, that Petitioner is hereby asking this Court to review the May, 1962, denial of certiorari in *Smith* v. *State*. The Petitioner makes continual reference to the previous opinion of the Florida Supreme Court because that opinion very obviously underlies both the conviction of the Petitioner by the lower Florida courts and the final denial of certiorari by the Supreme Court of Florida.

II.

Respondent contends that the denial of certiorari by the Supreme Court of Florida was based on its lack of jurisdiction, an adequate "state ground." That argument must be rejected. Respondent's statement that Petitioner's conviction by the trial court had to be appealed directly to the Florida Supreme Court is erroneous, for Rule 2.1 (5)(a) of the Florida Appellate Rules is permissive and not mandatory. It provides that the appeal "may" be taken from the trial court directly to the Supreme Court. Only in cases where the trial court "passes directly" on the validity of the Constitution or a statute must review be sought directly in the Supreme Court. *Robinson* v. *State*, 132 So. 2d 3. This was not such a case. The validity of the statute in question had already been directly passed upon and decided by the Supreme Court in *State* v. *Smith*, *supra*. The trial court, as its decision demonstrates, was limited to findings of fact and conclusions of law as circumscribed by the *State* v. *Smith* decision. Accordingly, Petitioner chose to appeal the conviction to the Circuit Court under Article V, Section 6(3) of the Florida Con-

stitution. That provision states that Circuit Courts "shall have final appellate jurisdiction . . . of all misdemeanors tried in criminal courts of record. . . ." That appeal was perfectly proper.

Thereafter, while it might have been the proper course for Petitioner to have sought a writ of certiorari before an appropriate District Court of Appeal, Petitioner chose instead to exhaust his state court remedies by direct review in the Supreme Court of Florida. That Court, whether rightly or wrongly, did assume jurisdiction in order to deny certiorari. The Court did not dismiss the Petition, as it would have done had jurisdiction been lacking, but considered the Petition and denied certiorari.

It is seriously doubted that the Supreme Court *has the power* to deny certiorari for lack of jurisdiction where another appellate court has such jurisdiction over the case. Article V, Section 4(2) of the Florida Constitution states:

> "The supreme court *shall* provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked." (emphasis supplied).

Had the Court in this case deemed its jurisdiction lacking, it would not have denied certiorari but would have transferred the case to the proper appellate court. That has been its consistent practice. Thus, in *Robinson* v. *State, supra,* a petition for a writ was wrongly filed with the Court, and a motion was made to dismiss for lack of jurisdiction. The Court, however, did not dismiss the petition but considered it as a motion to transfer, and ordered the case transferred to the appropriate District Court of Appeals. Had Respondent in this case filed a similar motion, or had the Court deemed its jurisdiction wrongly invoked, the Court would not have denied certiorari, but

would have instead remanded the case to the appropriate District Court of Appeals.

The foregoing makes it manifest that the denial of certiorari in the instant case was based not on lack of jurisdiction but on the Court's view of the merits. No further opinion was needed. So far as that Court was concerned, everything that had to be said by way of explanation for its decision had already been amply stated in *State* v. *Smith, supra*. The denial of certiorari finally and simply wrote *finis* to these proceedings in the state courts of Florida.

III.

Equally compelling is the fact that Respondent has effectively waived its right to make the foregoing argument. Unlike the Respondent in *Robinson* v. *State, supra,* the Respondent here did not make a motion to dismiss the petition before the court below. Nor did Respondent by any other means raise the contention of lack of jurisdiction before that court. A comparison of the court's action here with its decision in *Robinson* v. *State* demonstrates that the court does not act on its own motion but solely on that of the litigants. The argument that the Supreme Court of Florida did not have jurisdiction to entertain the petition for a writ of certiorari was obviously available to Respondent before that Court, but Respondent did not raise it. Under principles long ago established by this Court, the Respondent, having failed to make the instant argument before the court below, may not now press it before this Court. *U.S.* v. *Hoffman,* 335 U.S. 77 (1948); *Ex parte Century Indemn. Co.,* 305 U.S. 354 (1938).

IV.

Petitioner respectfully submits that its petition to this Court, raising substantial issues relative to basic rights of unions and individuals under federal law and the Con-

stitution, should not be denied on a ground that was not raised in the courts below and that makes an unfounded and erroneous assumption as to the underlying basis of the decision below.

Respectfully submitted,

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